
COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

VERONICA ALDUDE CHOQUE,

Plaintiff/ Respondent,
v.

ELMER K. TURNGREN AND SALLY ANN TURNGREN,

Defendants/ Petitioners,

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COURT OF APPEALS
DIVISION I
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PETITIONER'S BRIEF

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I. INTRODUCTION

Petitioner Sally Ann Turngren, defendant below, (hereinafter “Turngren” or “Defendant”) respectfully asks this Court to reverse the trial court’s Order Granting Plaintiff’s Motion for Partial Summary Judgment, dated February 8, 2016.

Turngren, the widow of Defendant Elmer Turngren and the surviving member of the Turngrens’ marital community, is the sole remaining defendant in a lawsuit brought by Respondent Veronica Aldude Choque (hereinafter “Aldude” or “Plaintiff”), based on a January 8, 2014 automobile accident in which Mr. Turngren was at fault. Plaintiff’s lawsuit, identified as King County Superior Court Case No. 14-2-22010-3 SEA, makes claims of negligence against Turngren and her deceased spouse and seeks damages for injuries Aldude allegedly suffered as a result of the accident.

On or about September 21, 2015, Plaintiff filed a Motion for Partial Summary Judgment seeking an order finding that, as a matter of law, she was entitled to judgment against Defendant Elmer Turngren for past medical expenses in the amount of \$8,700.” The motion advocated summary judgment for these medical expenses based on the declarations of Plaintiff’s treating healthcare providers that the subject medical expenses were incurred for reasonable and necessary care, as well as

Turngren's admissions that the amounts charged for the care were reasonable for the services provided and Turngren's expert's statement that the term and frequency of treatment received by Aldude "would not necessarily be considered unreasonable in and of itself."

Turngren argued in opposition to Plaintiff's motion that various genuine issues of material fact existed with respect to the relatedness of Plaintiff's medical care to the accident at issue, and with respect to the necessity (sometimes referred to as "reasonable necessity") of certain aspects of her care. Turngren submitted evidence supporting the existence of these issues including a declaration from her expert, as well as certain of Plaintiff's own records which themselves showed the existence of genuine issues of material fact regarding Plaintiff's entitlement to the medical special damages for which Aldude sought summary judgment.

The trial court granted Plaintiff's motion over Turngren's opposition, and Turngren sought discretionary review based on the court's decision of issues of fact as a matter of law.

II. ASSIGNMENT OF ERROR

A. Assignment of Error

The trial court erred in entering the order of February 8, 2016, granting Plaintiff's Motion for Partial Summary Judgment.

B. Issues Pertaining to Assignment of Error

1. Did the trial court err by deciding as a matter of law that Plaintiff was entitled to judgment for past medical special damages where Turgren's evidence supported the existence of genuine issues of material fact as to Plaintiff's entitlement to those damages?

III. STATEMENT OF THE CASE

A. Factual Background

This matter arose from a motor vehicle collision which occurred in Snohomish County, Washington on January 8, 2014, which was caused by Petitioner Elmer K. Turngren.¹ Liability for the cause of the collision is not disputed by Defendant.²

Following the motor vehicle collision, Respondent Veronica Aldude Choque³ received chiropractic care from Trevor Nabholz, DC of Accident & Injuries Clinic, to whom she was referred by her attorney,⁴ on dates ranging from January 9, 2014 to March 20, 2014,^{5 6} when Aldude

¹ CP 2.

² CP 43.

³ Ms. Aldude has changed her surname to Valdivia since the lawsuit below was filed, however, she is referred to here by the name on the caption of that lawsuit, for purposes of continuity and ease of reference.

⁴ CP 98, lines 8-9; 23-25.

⁵ CP 12.

terminated her care with Dr. Nabholz due to its ineffectiveness.⁷ During the course of her chiropractic treatment with Dr. Nabholz, Aldude also visited a healthcare facility called US Healthworks on January 18, 2014.⁸

Subsequent to terminating her care with Dr. Nabholz because she felt he was not doing enough to help her,⁹ Aldude was referred to another chiropractic practice by her current attorney, Sean Malcolm.¹⁰ Aldude received additional chiropractic care from Walter Scott, DC and Ryan Coogan, DC, of Eastside Spine and Wellness on dates ranging from March 18, 2014 through at least July 14, 2014.¹¹ During that period, Ms. Aldude was also evaluated by physiatrist Kaya Hasanoglu, MD of Pain & Injury Clinic on June 12, 2014, who noted that he would add a home exercise

(continued . . .)

⁶ See, also CP 28-30.

⁷ CP 102, lines 1-5.

⁸ CP 12.

⁹ CP 102, lines 9-13.

¹⁰ Id. at lines 6-8.

¹¹ CP 34-37.

plan to Aldude's existing regimen of chiropractic care and massage,¹² but did not document any such home exercise plan in Aldude's records.¹³

After Aldude commenced her lawsuit against the Turngrens, she served, through counsel, certain requests for admission on defendants.¹⁴ That discovery sought, among other things, admissions that, with respect to the care provided by Drs. Nabholz (Accident & Injuries Clinic); Coogan and Scott (Eastside Spine and Wellness) and Hasanoglu (Pain & Injury Clinic), as well as that provided by US Healthworks, "each separate item of medical care, treatment and services on [the attached] billing... was reasonably necessary to the diagnosis and treatment of Veronica Aldude Choque's injuries resulting from the auto collision."¹⁵ Turngren *denied* each such request for admission, while admitting for each item of care in question that "[t]he amount of the charges in [the associated] billing was reasonable in amount for similar services in the medical community."¹⁶

¹² CP 122.

¹³ CP 127 (Declaration of Pain & Injury Clinic record custodian certifying that the foregoing three pages constitute the complete set of records for Aldude as of February 10, 2015.)

¹⁴ CP 12; 19-25.

¹⁵ CP 22-25 (Requests for Admission 6-9)

¹⁶ CP 44-49.

As a part of Turngren's analysis of Aldude's claims for injuries and resulting need for medical care which led to the denials referenced above, Turngren's attorneys commissioned Dr. Austin McMillin, DC of Proactive Spine Care to perform a review of the clinical records generated in connection with Aldude's care.¹⁷ In that review, Dr. McMillin answered a prompt asking him to comment on the reasonableness and necessity of Aldude's care, as related to the automobile collision, as follows:

A chiropractic care and massage therapy orientation would be considered reasonable in the early stages following injury, but as noted above, a transition to active care would have been indicated. It is challenging to support ongoing passively-oriented care throughout the duration of the course of treatment provided. The overall term of care with respect to frequency, duration or actual numbers of treatments from January 2014 through August 2104, however, would not necessarily be considered unreasonable in and of itself for the care of the likely injuries sustained in the subject accident of January 8, 2014.¹⁸

The "as noted above" language in the foregoing quote refers to the following language, found on the preceding page of Dr. McMillin's review report:

Finally, with respect to prognosis, it is significant that the entire course of treatment as provided has been almost exclusively passively oriented. There has been no

¹⁷ CP 162.

¹⁸ CP 177.

*significant active rehabilitation or transition to active care approach provided within the context of care subsequent to the January 8, 2014 accident. Passive care orientation has been known to promote patient dependency on treatment and result in protracted symptoms. Generally accepted guidelines for treatment for mechanical spine disorders including injury follow a pathway of transition from passive to active care, a transition which was not conducted in the care as provided to this claimant.*¹⁹

Moreover, after stating that the *term* of Aldude’s care “would not necessarily be considered unreasonable,” Dr. McMillin asserted specific denials of the reasonableness and necessity of certain of the care received by Aldude at Accident & Injury Clinic and Eastside Spine and Wellness, as well as raising questions about whether the US Healthworks treatment was related to the accident at issue.²⁰ Additionally, in his report, Dr. McMillin noted that there was “significant disagreement” in the diagnoses rendered by Aldude’s healthcare providers,²¹ that Aldude received chiropractic care that was actually contra-indicated by her alleged condition,²² and that neither of Aldude’s chiropractic providers appeared to be aware of a pre-accident, 2008 radiograph “demonstrating relevant findings of suggested vertebral body compression... consistent with

¹⁹ CP 176.

²⁰ CP 177-178.

²¹ CP 175.

²² CP 175-176.

historical trauma,” and Aldude’s 2008 report “of a 3 year history of significant symptoms before presenting for care.”²³

B. Procedural History

Aldude brought her Complaint for negligence against Turngren and the late Elmer Turngren on or about August 8, 2014.²⁴ Subsequently, Aldude brought a Motion for Partial Summary Judgment on September 21, 2015.²⁵ In that motion, Aldude argued that she was entitled to summary judgment for \$8,700 of medical expenses incurred for her treatment with Drs. Nabholz; Coogan and Scott, Hasanoglu, and with US Healthworks, as that care was “was reasonable, necessary and related to the accident,” and claimed that “the evidence supports only this conclusion, and... Defendant has no reasonable contrary evidence.”²⁶

In support of her motion, Aldude offered the declarations of Drs. Nabholz and Coogan, and Turngren’s responses to Aldude’s Requests for Admission.²⁷

²³ CP 176.

²⁴ CP 1-4.

²⁵ CP 11-15.

²⁶ CP

²⁷ CP 14; see, also CP 52-27 (Nabholz Declaration and GR17 Affidavit); CP 58-61 (Coogan Declaration); CP 41-51 (RFA Responses).

Turngren filed her Response to Plaintiff's Motion for Partial Summary Judgment on or about October 12, 2015,²⁸ relying upon, among other things, a declaration from Dr. Austin McMillin regarding Aldude's care. After a continuance in the hearing of Aldude's summary judgment motion,²⁹ Turngren filed a Supplemental Response to that motion on January 11, 2016.³⁰

On or about January 19, 2016, Aldude filed a Reply in support of her previous motion for partial summary judgment.³¹ Subsequently, the Superior Court heard oral argument from the parties on January 22, 2016, and reserved judgment on Aldude's motion, although in so reserving, the Court designated the motion as being that of "Defendant."³²

On February 8, 2016, the Superior Court (Benton, J.), having reviewed all of the foregoing pleadings and supporting declarations, issued an order granting Aldude's motion, finding that "Plaintiff Aldude Choque has demonstrated an entitlement to judgment against Defendant Elmer Turngren for past medical expenses in the amount of \$8,700" and

²⁸ CP 66-80.

²⁹ CP 137.

³⁰ CP 140-143.

³¹ CP 149-155.

³² CP 181.

stating that “[t]he jury shall be so instructed at trial.”³³ It was upon that order which Turngren sought discretionary review.³⁴

IV. ARGUMENT

A. Standard of Review

An order granting or denying summary judgment is reviewed de novo, and the appellate court “performs the same inquiry as the trial court” in its review.³⁵ Moreover, “[t]he reviewing court should view the facts and reasonable inferences from those facts in the light most favorable to the nonmoving party.”³⁶

CR 56(c) only allows summary judgment to be granted where “there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.”³⁷ On a summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact.³⁸ Summary judgment must be denied if, from the

³³ CP 182-183.

³⁴ CP 184-187.

³⁵ *Ruvalcaba v. Kwang Ho Baek*, 175 Wn.2d 1, 6, 282 P.3d 1083, 1085 (2012) citing *Sheikh v. Choe*, 156 Wash.2d 441, 447, 128 P.3d 574 (2006).

³⁶ *Ruvalcaba*, 175 Wn.2d at 6 quoting *Michak v. Transnation Title Ins. Co.*, 148 Wash.2d 788, 794, 64 P.3d 22 (2003). (Internal quotations omitted.)

³⁷ *CR 56(c)*.

³⁸ *Young v. Key Pharmaceuticals, Inc.*, 112 Wash.2d 216, 225, 770 P.2d 182 (1989) (citations omitted).

evidence and reasonable inferences therefrom, reasonable people might reach different conclusions about the moving party's entitlement to summary judgment.³⁹ Stated another way, a motion for summary judgment should be granted only if there is no genuine issue of material fact or if reasonable minds could reach only one conclusion on that issue based upon the evidence construed in light most favorable to the non-moving party.⁴⁰

B. The Trial Court Committed Error When it Granted Aldude's Motion for Summary Judgment Because Genuine Issues of Material Fact Existed With Respect To Aldude's Subject Medical Special Damages.

As a threshold matter, it should be noted that, to show entitlement to damages for medical expenses in an accident case, a plaintiff must show that the expenses were reasonable and necessary,⁴¹ and related to the accident at issue.⁴² Accordingly, for a plaintiff to obtain summary judgment as to her entitlement to medical expenses, she must show that, even where all reasonable inferences are resolved in favor of the non-moving party, reasonable people could not disagree as to these matters of

³⁹ *Kuehn v. White*, 24 Wn.App. 274, 280, 600 P.2d 679, 683 (1979) citing *CR 56(c)*; *Jacobsen v. State*, 89 Wn.2d 104, 108-09, 569 P.2d 1152 (1977).

⁴⁰ *Weatherbee v. Gustafson*, 64 Wash.App. 128, 131, 822 P.2d 1257 (1992).

⁴¹ See, e.g., *Patterson v. Horton*, 84 Wn. App. 531, 543, 929 P.2d 1125, 1130 (1997)

⁴² See *Palmer v. Jensen*, 132 Wn.2d 193, 199, 937 P.2d 597, 600 (1997)

reasonableness, necessity and relatedness.⁴³ If, on the other hand, there is competing evidence regarding these elements, the question of the plaintiff's entitlement to such damages is one for the jury to resolve.⁴⁴

In issuing its order of February 8, 2016, and granting Aldude's motion, the trial court implicitly held—in light of the above authorities—that, as a matter of law, reasonable people could not disagree that Aldude's \$8,700 in medical expenses were incurred for necessary care, related to the accident. The trial court so held despite Turngren's submission of various contrary evidence, described below, and thus must have weighed the competing evidence submitted by the parties, which is not a proper function of the court in this context.⁴⁵ As such, the trial court's grant of summary judgment is error, and should be reversed on review.

⁴³ See *Weatherbee*, *supra* at fn. 40.

⁴⁴ *Cox v. Charles Wright Acad., Inc.*, 70 Wn.2d 173, 176, 422 P.2d 515, 518 (1967) (“when the evidence concerning injuries is conflicting, the jury... determines the amount of damages.”); *Hawkins v. Marshall*, 92 Wn. App. 38, 44, 962 P.2d 834, 837 (1998) (“Once medical bills are admitted, the credibility of the evidence and the amount of the damages is then a *question of fact for the jury*.”) quoting *Maurer v. Grange Ins. Ass'n, Inc.*, 18 Wn. App. 197, 203, 567 P.2d 253, 257 (1977) (Internal quotations and parentheticals omitted.)

⁴⁵ See, e.g., *Herriman v. May*, 142 Wn. App. 226, 232, 174 P.3d 156, 159 (2007)

1) Aldude's evidence in support of summary judgment.

In support of her original motion for summary judgment on the subject medical expenses, Aldude submitted the declarations of two of her treating chiropractors, Trevor Nabholz, DC⁴⁶ and Ryan Coogan, DC,⁴⁷ as well as Turngren's responses to certain requests for admission, admitting that the charges billed for the care at issue in the motion were "reasonable in amount for similar services in the medical community."⁴⁸

Turngren's request for admission responses, as noted above, specifically denied the proposition that "each item" of the subject care "was *reasonably necessary* to the diagnosis and treatment of Veronica Aldude Choque's injuries *resulting from the auto collision*" of January 8, 2014.⁴⁹ Accordingly, while those admissions may have established the reasonableness of the *amounts* claimed by Aldude for a particular item of care, they did nothing to establish the proposition that any such item was necessary to her recovery or related to the January 8 accident.

Accordingly, to establish the elements of necessity and relatedness, Aldude relied upon the declarations of Drs. Nabholz and

⁴⁶ CP 52-54.

⁴⁷ CP 58-61.

⁴⁸ CP 44-49 (RFAs 6-9.)

⁴⁹ Id. (Emphasis supplied.)

Coogan. The declaration of Dr. Nabholz stated as to these matters, in a conclusory fashion, the following:

Based on my examination and treatment of Ms. Aldude Choque, it is my opinion that Ms. Aldude Choque suffered the cervical-thoracic-lumbar sprain/strain injuries and other injuries stated in my medical records^{50]} as a result of a motor vehicle collision on January 8, 2014... and I believe that Ms. Aldude Choque's treatment and related medical expenses are reasonable, necessary and related to the January 8, 2013 motor vehicle accident.⁵¹

Dr. Coogan's declaration was more specific regarding his findings in the assessment and care of Aldude, and provided his opinion that, within a reasonable degree of medical certainty, his own "treatment [of Aldude] and related medical expenses have been reasonable, necessary and causally related to the motor vehicle collision on 1/8/14."⁵² Dr. Coogan further opined that "the treatment by Dr. Nabholz has been reasonable and necessary."⁵³

In Aldude's reply to Turngren's response to her motion for summary judgment, Aldude submitted further purported evidence of reasonable necessity and relatedness in the form of a report on a clinical

⁵⁰ These records were not appended or otherwise attached to Dr. Nabholz's declaration.

⁵¹ CP 53.

⁵² CP 61.

⁵³ CP 59.

record review conducted by Turngren's expert chiropractor, Dr. Austin McMillin.⁵⁴ Under the heading "Dr. McMillan [sic] Agrees that Plaintiff's Treatment is Reasonable,"⁵⁵ Aldude quotes the following language from Dr. McMillin's report:

*The overall term of care with respect to frequency, duration or actual numbers of treatments from January 2014 through August 2104, however, would not necessarily be considered unreasonable in and of itself for the care of the likely injuries sustained in the subject accident of January 8, 2014.*⁵⁶

Aldude's quote, however, omits the first part of the paragraph from which it derives, which states as follows:

*A chiropractic care and massage therapy orientation would be considered reasonable in the early stages following injury, but as noted above, a transition to active care would have been indicated. It is challenging to support ongoing passively-oriented care throughout the duration of the course of treatment provided.*⁵⁷

This omission by selective quoting materially changes meaning of the statement made by Dr. McMillin in his June 2, 2015 record review report. The complete quote reveals that, while McMillin believes a given number

⁵⁴ CP 162-180; see *supra* 5-6 for extensive quotations from the review report.

⁵⁵ CP 150. Turngren understands this heading and the following paragraph to refer to reasonable necessity of the treatment, as opposed to the reasonableness of amounts charged, which had already been admitted by Turngren.

⁵⁶ CP 150 (emphasis omitted)

⁵⁷ CP 177.

of treatments over a given the stated time period “would not necessarily be considered unreasonable” in treatment of Aldude’s likely injuries, he does not believe that the passive character of those treatments was appropriate and, rather, believes that a transition to an active approach to care was warranted.

Aldude relies on another deceptively-edited selection from Dr. McMillin’s June 2, 2016 report in support of the proposition that “Dr. McMillan [sic] Agrees That Plaintiff’s Treatment Is Related To The Accident,”⁵⁸ quoting that report as follows:

4. Is the treatment rendered to date related to the accident at issue?

Yes, with the stated qualifications related to the reasonableness of the care as discussed in response to Issue # 2, above...⁵⁹

Aldude then goes on to argue that

Dr. McMillin agrees that all of Plaintiff’s treatment between January 2014 and August 2014 was related to the accident at issue, except with stated qualifications related to the reasonableness of care. However... it is undisputed that Defendants have admitted in response to Plaintiff’s requests for admission that that all of the care is reasonable.⁶⁰

⁵⁸ CP 151.

⁵⁹ Id.

⁶⁰ Id.

This proposition—that Dr. McMillin agrees that all of Aldude’s subject care was related to the accident—derived from the second selective quote from Dr. McMillin’s report is fatally flawed in two ways. First, as can be determined from even a casual review of McMillin’s report, the “stated qualifications as to the reasonableness of the care as discussed in response to Issue # 2,” have nothing to do with the reasonableness of the amounts billed for care, which was the matter admitted by Turngren. Rather, the “stated qualifications” were, among others, McMillin’s opinions 1) that the care provided to Aldude was inappropriately passive; 2) that a transition to an active care approach should have been undertaken; 3) that there was a distinct question about whether Aldude’s care with US Healthworks was related to her suffering a new injury of rib fracture (possibly related to treatment) which was unrelated to the accident; 4) that a series of x-rays performed by Drs. Coogan and Scott would not be considered reasonable; 5) that there was insufficient documentation to support the reasonableness and necessity of many items of care provided to Aldude at Nabholz’s Accident & Injury Clinic; and 6) that certain traction and therapeutic exercise sessions at the clinic of Drs. Coogan and Scott were “not reasonable as documented.”⁶¹ Clearly, these “stated

⁶¹ CP 177-178.

concerns” raised in Dr. McMillin’s report cannot be whitewashed and discounted because of Aldude’s assertion that “Defendants have admitted that all of the treatment at issue was reasonable,”⁶² where that assertion is based on Turngren’s admission that the amounts charged for care were reasonable for similar services in the relevant community.

Second, a more complete reproduction of the quote from Dr. McMillin’s report relied on by Aldude to support the relatedness of care reveals that the “stated qualifications in response to Issue # 2” were not McMillin’s only grounds for doubting relatedness:

4. Is the treatment rendered to date related to the accident at issue?

*Yes, with the stated qualifications related to the reasonableness of the care as discussed in response to Issue # 2, above. **There is also the issue of the relevant medical history which includes an impression of a cervical compression fracture in 2008, coupled with symptoms at that time which were noted to be intermittent but longstanding. This raises the question about persisting symptoms going forward over time after the presentation in 2008, since those symptoms were reportedly chronic up to that point and therefore would have been unlikely to just self[-]resolve.***⁶³

It is clear from the above that Aldude used a strategically-placed ellipsis to paper over the fact that Dr. McMillin raised a concern about a

⁶² CP 151.

⁶³ CP 178.

preexisting and longstanding problem in Aldude's cervical spine, which constituted a significant caveat (in addition to the above-discussed "stated concerns") to his agreement that Aldude's treatment was related to the accident at issue. Indeed, Dr. McMillin's mention of the possible 2008 compression fracture is strongly indicative that he believed that some of the subject treatment received by Aldude was connected to that injury and not the accident at issue, giving lie to Aldude's contention that

*Dr. McMillin agrees that all of Plaintiff's treatment between January 2014 and August 2014 was related to the accident at issue, except with stated qualifications related to the reasonableness of care.*⁶⁴

As Aldude's revisionist quotes of Dr. McMillin's June 2, 2015 report are in clear and undeniable conflict with the actual meaning of the quoted sections, Aldude can find no real support in that report for her argument that Turngren's expert agrees with her as to the necessity and relatedness of the treatment she received. As such, Aldude's only real evidence in support of summary judgment was comprised of the declarations of Drs. Nabholz and Coogan, and Turngren's admissions respecting the reasonableness of the amounts charged for care.

⁶⁴ CP 151.

2. *Turngren's evidence in opposition to summary judgment.*

Turngren presented two discrete sets of evidence to the trial court in opposition to Aldude's summary judgment motion. The first such set was comprised of various parts of the records of Dr. Nabholz, the treating chiropractors whose declarations Aldude relied upon for the propositions that her care was necessary and related to the accident, as well as deposition testimony from Dr. Coogan and Aldude, herself, regarding that treatment. That evidence showed jury issues as to the relatedness and necessity of the care provided by Dr. Nabholz, which accounted for the majority (\$5,005)⁶⁵ of the damages upon which the trial court granted summary judgment. The second set of evidence was comprised of the various items expert testimony contained in the Declaration of Austin McMillin submitted in support of Turngren's response to Aldude's motion.⁶⁶ Independently or in combination, these sets of evidence were undoubtedly sufficient to raise material issues of fact with respect to the necessity and relatedness of Aldude's subject medical care and prevent summary judgment. By discounting this body of evidence and granting summary judgment to Aldude, the trial court erred.

⁶⁵ CP 53.

⁶⁶ CP 132-136.

a. The Nabholz Evidence

As to the care rendered by Dr. Nabholz, DC, Turngren produced evidence indicating that, at the outset of that care, Dr. Nabholz failed to discover⁶⁷ Aldude's prior history of paresthesia in her upper extremities, which was noted in 2008 to have been intermittently present for three years and to be "suspicious for an entrapment syndrome to start in the cervical spine."⁶⁸ As noted in Dr. McMillin's record review report, discussed above, this evidence raises questions of "persisting symptoms going forward over time after the presentation in 2008, since those symptoms were reportedly chronic up to that point and therefore would have been unlikely to just self[-]resolve." Indeed, Dr. Nabholz seems to admit in deposition that undisclosed history would have an effect on his opinions regarding relatedness of Aldude's treatment to the accident at issue:

Q: You cannot make an opinion as to whether it's a long-standing problem or related to a specific incident without having an accurate history; isn't that correct?

A: You need to have a good history in order to make a determination about how the patient was potentially injured.⁶⁹

⁶⁷ CP 106, line 11 ("She related to me that she had no long-standing problems.")

⁶⁸ CP 68; CP 108.

⁶⁹ CP 106.

Turngren also submitted evidence that Aldude terminated her care with Dr. Nabholz because, despite his treatment, she “continued feeling the same,” and did not feel that Dr. Nabholz was doing enough to help her condition.⁷⁰

Finally, Turngren submitted evidence taken from Dr. Nabholz’s own records that some of the care provided by Nabholz’s clinic—care which Dr. Nabholz declared was reasonable and necessary—may have caused a new injury to Aldude or worsened her symptoms.⁷¹ Dr. Nabholz’s chart note for January 16, 2014 indicated that Aldude’s “[h]eadache, neck pain, upper back pain, low back pain and mid back pain all worse right after massage” and that she had also become dizzy following massage treatment.⁷²

In light of the above evidence, even before submission of her own expert testimony, Turngren had demonstrated the existence of genuine issues of material fact respecting Aldude’s entitlement to damages for Nabholz’s care. Specifically, Turngren demonstrated a jury issue regarding relatedness by showing the existence of a longstanding,

⁷⁰ CP 102.

⁷¹ CP 76.

⁷² CP 129.

preexisting condition in Aldude's cervical spine, which was unknown to Dr. Nabholz at the time of his treatment for "cervical-thoracic-lumbar sprain/strain injuries"⁷³ and pointing to his own admission that a "good history" is necessary to a determination of relatedness.⁷⁴ Turngren demonstrated a further jury issue regarding the necessity of Dr. Nabholz's care by showing that it was, by Aldude's admission, ineffective and was, as demonstrated by Dr. Nabholz's own chart notes, even deleterious to Aldude's recovery.

b. The Austin McMillin Declaration

In addition to the above, Turngren submitted affirmative evidence, in the form of the declaration of Dr. Austin McMillin, in opposition to plaintiff's motion for summary judgment. That declaration was reviewed by the trial court,⁷⁵ and there is no suggestion in the record that the trial court struck the declaration. The trial court, however, apparently discounted Dr. McMillin's declaration as demonstrating any genuine issue of material fact with respect to the necessity and relatedness of Aldude's subject treatment. Under Washington law, the only way the trial court

⁷³ CP 53.

⁷⁴ CP 106 (see quote, *supra* at p. 22)

⁷⁵ CP 182.

could have reached this result is to discount Dr. McMillin's declaration as containing only mere speculation or conclusory statements.⁷⁶

A review of Dr. McMillin's declaration clearly reveals that it contains more than mere speculation and conclusory statements—rather, it sets out many facts that would be admissible in evidence⁷⁷ in support.

The declaration sets out, among others, the following opinions and supporting facts in opposition to the propositions that the subject care was necessary and related to the accident at issue:

- 1) Positioning abnormalities in the x-ray imaging Dr. Coogan relied upon to support his diagnosis of ligament laxity in Aldude's cervical spine "prevented an adequate templating analysis of the patient's cervical spine," which led to an unreliable diagnosis of ligament laxity. This opinion and its factual support demonstrate the existence of a genuine issue of material fact as to whether much of Dr. Coogan's treatment of

⁷⁶ See, e.g., *Cho v. City of Seattle*, 185 Wn. App. 10, 20, 341 P.3d 309, 314 (2014), review denied, 183 Wn.2d 1007, 349 P.3d 857 (2015) ("In order to preclude summary judgment, an expert's affidavit must include more than mere speculation or conclusory statements.")

⁷⁷ A key measure of whether of the sufficiency of an affidavit submitted in opposition to summary judgment. See *Dunlap v. Wayne*, 105 Wn.2d 529, 536, 716 P.2d 842, 847 (1986)

Aldude, which was based on a diagnosis of ligament laxity,⁷⁸ was necessary.⁷⁹

- 2) “Much of Ms. Aldude’s chiropractic care would likely have been rendered *unnecessary* if her treating chiropractors had undertaken an appropriate transition to active care,” as active care “has been shown to significantly improve response to care” as opposed to the passive care received by Aldude, which “promotes patient dependency on treatment.”⁸⁰
- 3) The collective failure of all of Aldude’s chiropractors to review “relevant medical records, including a significant historical documentation of longstanding bilateral upper extremity pain and paresthesia of three years’ duration and associated imaging suggestive of vertebral body compression” prevented Drs. Nabholz, Coogan and Scott from making a clinically reasonable determination that Aldude’s diagnosis was related to the accident at issue.⁸¹

⁷⁸ CP 59.

⁷⁹ CP 133.

⁸⁰ Id. (Emphasis supplied.)

⁸¹ CP 134.

- 4) The failure of Drs. Hasanoglu and Nabholz to diagnose Aldude with, or even raise a suspicion of cervical ligament laxity, as was later diagnosed by Dr. Coogan, “constitutes good clinical evidence that the condition did not exist at the time of those doctors’ treatment of Ms. Aldude.”⁸² As above, this demonstrates a genuine issue of material fact as to whether Dr. Coogan’s treatment of Aldude for ligament laxity was necessary.
- 5) Dr. Coogan performed prone drop-table extension adjustments and weighted cervical extension traction on Aldude, which treatment modalities were contra-indicated by Dr. Coogan’s diagnosis of cervical ligament laxity.⁸³ This demonstrates the existence of a jury issue as to whether the subject care was necessary.
- 6) Dr. Nabholz performed or caused to be performed x-ray imaging in January 2014 that resulted in “images that were effectively useless,” and such images were not re-taken,

⁸² Id.

⁸³ CP 135.

indicating that the subject imaging was unnecessary in the first instance.⁸⁴

- 7) Aldude underwent therapeutic exercise sessions at Dr. Nabholz's clinic which were unsupervised, and this lack of supervision violated chiropractic standards of practice, rendering them unnecessary.⁸⁵

Assuming the trial court did not find Dr. McMillin's declaration and the above opinions and supporting facts to represent only conclusory statements or speculation—and there is no suggestion in the record that it did—the trial court must have weighed Dr. McMillin's declaration against the evidence provided by Aldude. In light of the non-conclusory and non-speculative nature of Dr. McMillin's declaration, the conclusion that the trial court did, in fact weigh the competing expert declarations and other evidence is inescapable.

As such, the conclusion that the trial court erred in granting the subject motion for partial summary judgment is likewise inescapable. It is black-letter law in Washington that a "trial court does not weigh the

⁸⁴ Id.

⁸⁵ CP 136.

evidence or assess witness credibility on a motion for summary judgment.”⁸⁶

V. CONCLUSION

The trial court’s decision to grant summary judgment to Aldude was in error. In order to grant reach that result, the trial court must have 1) discounted substantial evidence from the records of Dr. Nabholz and the deposition testimony of Aldude that Dr. Nabholz failed to properly review and account for Aldude’s medical history, which bore on the relatedness of his treatment, and provided care that was ineffective and potentially harmful, making such care unnecessary; and 2) either wrongly dismissed the declaration of Turngren’s expert Dr. McMillin as speculative and conclusory, or improperly weighed that declaration against the declarations submitted in support of summary judgment. The trial court’s conclusion that none of this evidence demonstrated the existence of even a single genuine issue of material fact as to Aldude’s entitlement to the subject damages constituted obvious error, and should be reversed.

⁸⁶ *Fleming v. Smith*, 64 Wn.2d 181, 185, 390 P.2d 990, 993 (1964) (“The trial court is not permitted to weigh the evidence in ruling on summary judgment.”) *Am. Exp. Centurion Bank v. Stratman*, 172 Wn. App. 667, 676, 292 P.3d 128, 133 (2012) citing *Preston v. Duncan*, 55 Wn.2d 678, 682, 349 P.2d 605 (1960)

RESPECTFULLY SUBMITTED this 22nd day of July, 2016.

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**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

VERONICA ALDUDE
CHOQUE,

Plaintiff,
v.

ELMER K. TURNGREN AND
SALLY ANN TURNGREN,

Petitioners,

NO: 74719-3-I

DECLARATION OF SERVICE

On this day, the undersigned served pursuant to CR5(b) all parties
listed below with copies of:

1. Petitioner's Brief; and
2. Declaration of Service.

ATTORNEY FOR PLAINTIFF:

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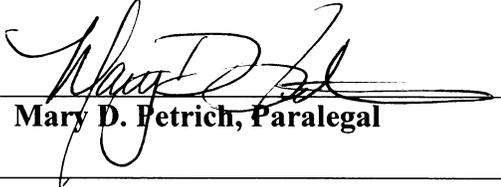
I certify under penalty of perjury under the Laws of the State of Washington that the foregoing is true and correct.

Dated at Tacoma, Washington, this 22nd day of July, 2016.

By:

Print

Name:


Mary D. Petrich, Paralegal